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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

WALTER J. FLECK, ET AL.,

Appellants,

vs.

WARREN SPANNAUS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

BRIEF OF APPELLANT ALLIED STRUCTURAL STEEL COMPANY.

GEORGE B. CHRISTENSEN,
CHESTER W. NOSAL,
DAVID L. LEE,
Suite 5000,
One First National Plaza,
Chicago, Illinois 60603,

JOHN R. KENEFICK,
2200 First National Bank Building,
St. Paul, Minnesota 55101,
Counsel for Appellant.

Of Counsel:
WINSTON & STRAWN,
Suite 5000,
One First National Plaza,
Chicago, Illinois 60603.

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OPINIONS BELOW.

The judgment of the District Court is not yet reported. It is printed at J. A. A-67.

Earlier opinions in this case or that certified by the District Court to the Supreme Court of Minnesota are reported as follows:

1. Order convening three-judge court	412 F. Supp. 366 (D. Minn. 1976)
2. Order certifying questions of state law to the Minnesota Supreme Court	421 F. Supp. 20 (D. Minn. 1976) (J. A. A-56, A-65)
3. Opinion of the Minnesota Supreme Court	..... Minn. ....., 251 N. W. 2d 334 (1977)

JURISDICTION.

Appellant sued to enjoin the enforcement of the Minnesota Private Pension Benefits Protection Act as being unconstitutional. J. A. A-1. A three-judge court entered a judgment on September 2, 1977, J. A. A-67, A-85, which it revised on September 21, 1977, J. A. A-86, denying the injunction and upholding constitutionality. Appellants filed a Notice of Appeal on September 27, 1977, J. A. A-89; a Jurisdictional Statement on November 25, 1977. On January 23, 1978, the Court noted probable jurisdiction. Jurisdiction is conferred by 28 U. S. C. § 1253.

PROVISION OF THE CONSTITUTION INVOLVED.

U. S. Const. Art. I, § 10, cl. 1 states, in relevant part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

STATUTE INVOLVED.

The Minnesota Private Pension Benefits Protection Act, *Minn. Stat.* § 181 B.01 *et seq.* (1974), Laws 1974, ch. 437, is printed at J. A. A-90.

QUESTION PRESENTED.

Do states have greater latitude under the Contracts Clause of the Constitution to impair the obligation of private contracts than those of public bodies?

STATEMENT OF THE CASE.

This appeal challenges the constitutionality of a Minnesota statute which, in effect, changed the substantive terms of pension agreements between a company and its employees.

The company, appellant Allied Structural Steel ("Allied"), operated an office in Minnesota, employing thirty people. J. A. A-40, A-41. In August, 1963, Allied instituted a pension plan for its employees. J. A. A-39. Contributions to the trust, all of which were made by Allied, were made to the trust which was the funding mechanism of the plan and were neither earmarked for, nor allocated to, specific employees but, instead, were paid in a gross amount that actuaries calculated to be sufficient to meet the obligations of the contract to the covered group. J. A. A-39, A-68, A-71, A-72. The actuaries assumed that, for various reasons, not all employees would remain in Allied's employment long enough for their benefits to vest. J. A. A-72. These reasons included, for example, death and loss of job; they neither expressly included nor expressly excluded Allied's closing a plant. J. A. A-68, A-72, A-73. The pension plan contained no promise Allied would keep it in effect for any period and included a provision permitting Allied to terminate it and prescribing how the assets of the pension trust would be allocated to various classes of employees. See § 14 at 13a-14a, Appendix, *infra*, Art. IX at 26a, Appendix, *infra*. (The full plan does not appear in the Joint Appendix but was submitted to the court on oral argument. *See* J. A. A-40. Full copy appears as an Appendix to this brief.) Under the plan, an employee's benefits vested if:

1) the employee has worked fifteen continuous years and attained the age of 60; or
2) was 55 or older and his age added to his years of continuous service totaled at least 75; or
3) was younger than 55, and his age added to his years of continuous service totalled at least 80. J. A. A-40, A-44.

Thus, if an employee began working for Allied at age 26, his retirement benefits would vest when he reached age 53.

On April 10, 1974, the Minnesota legislature enacted the Minnesota Private Pension Benefits Protection Act ("Act"), *Minn. Stat.* § 181 B.1 *et seq.*, which provided in essence that if an employer closed a plant in Minnesota he would owe his employees a "pension funding charge" for all years of service of 10 or more that were not vested under the employer's plan. The "charge" would be used to purchase paid-up annuities payable to the affected employees when they reached retirement age. *Minn. Stat.* § 181 B.12, J. A. A-101.

In effect, this imposed guaranteed, retroactive, vested pension benefits after 10 years of service. Under the Act, if employees began working for Allied at age 26, their retirement benefits would vest at age 36—seventeen years earlier than under their contracts with Allied. (A special master later determined that, to meet the statutorily imposed provisions, Allied would have to pay from $114,171 to $185,751 more than it had contracted to pay. J. A. A-68.)

The Act contained a so-called "self-destruct" provision (*Minn. Stat.* § 181 B.17, J. A. A-102) that it was to become "null and void" upon "institution" of a federal law guaranteeing the payment of a substantial portion of an employee's vested pension benefits. In fact, on February 28, 1974, seven weeks before the Minnesota Act was passed, the United States House of Representatives already had passed its version of what became the Employee Retirement Income Security Act of 1974 ["ERISA"]. 120 Cong. Rec. 4781-82 (1974). On March 4, 1974, over a month before the Minnesota Act was passed, the Senate had passed its version and selected members to meet with representatives of the House in conference. *Id.* at 5011. The House selected its conferees on April 2, eight days before the Minnesota Act was passed. *Id.* at 9286. The Conference Committee reported to the House on August 12 (*id.* at 27708) and to the Senate on August 13 (*id.* at 27997). Within 10 days, both

Houses passed ERISA (*id.* 29215-16, 29963). The President signed the bill on September 2, 1974.

Sometime after the Minnesota Act was passed, Allied began to phase out its Minnesota office. Minnesota then sought to enforce the early-vesting provisions of its Act against Allied. J. A. A-41, A-42, A-47.

Allied and the fiduciaries of its pension plan brought suit in the Northern District of Illinois to have the Minnesota Act declared unconstitutional and its enforcement enjoined. J. A. A-1. The suit was transferred to the District of Minnesota under 28 U. S. C. § 1404.

The United States District Court for the District of Minnesota convened a three-judge court. 412 F. Supp. 366 (1976). It certified several state-law questions to the Minnesota Supreme Court, J. A. A-65, but the answers of that court left the federal constitutional questions dispositive. (*Fleck* v. *Spannaus*, ... Minn. ....., 251 N. W. 2d 334 (1977)).

In the proceedings here Minnesota conceded that it impaired Allied's contracts with its employees. J. A. A-71. Nevertheless, the District Court held the Act constitutional because of the "considerable deference" it believed must be accorded state legislation impairing private, as distinguished from public, contracts. It held that what was taught in *United States Trust Company* v. *New Jersey*, 431 U. S. 1 (1977), enforcing the Contracts Clause, was limited to protection of public contracts and is not applicable to private contracts and that in any event the reformed contracts were not "significantly beyond the parties' initial expectations." J. A. A-74.

Allied appealed, and this Court noted probable jurisdiction on January 23, 1978.

SUMMARY OF ARGUMENT.

The Court has so recently and thoroughly considered the Contracts Clause in *United States Trust Co.* v. *New Jersey*, 431 U. S. 1 (1977), and currently is examining the Minnesota Private Pension Benefit Protection Act in *White Motor Corporation* v. *Malone*, No. 76-1184, that a brief fully detailing the cases under the Contracts Clause or fully exploring the Minnesota Act and its remaking of contracts would be redundant.

Therefore, the emphasis of this brief is directed to the fallacious theories by which the opinion below sought to escape *United States Trust*: that private contracts are entitled to less protection under the Contracts Clause than public contracts and that employers and employees reasonably "anticipated" that full pensions would be paid despite the limitations and the termination clauses of the Plan.

The Minnesota Act forces Allied retroactively to spend money to fulfill new pension contracts which the legislature created. This impairment goes far beyond that upheld in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934), for there, the impairment merely delayed the foreclosure process and required the payment to the mortgagee of rent during the enforcement proceedings. In this case, the core of the basic undertaking is changed by Minnesota to cast vast retroactive liabilities on the employer and confer benefits on employees far beyond those they had a right to expect under their contracts. The District Court's assertion that such a remade contract was within the reasonable expectations of the parties is without rational support.

Further, although the District Court asserts that the Minnesota Act takes money away from pension plan employers to help a minor segment of "senior citizens", it is apparent that

if Minnesota can do that, it can invade or re-make contracts concerning any citizen or group of citizens, for the aid of any other identifiable group of citizens, can exercise its force to alleviate any group of citizens whose contracts have proven not so fortunate as they originally may have thought. Finally, the unreasonability of the Act is shown by comparing it with the Employee Retirement Income Security Act of 1974, P. L. 93-406, 88 *Stat.* 829 ["ERISA"]. Unlike the Minnesota Act, ERISA did not force any employers to change their contracts with their employees.

ARGUMENT.

THE MINNESOTA ACT VIOLATES THE CONTRACTS CLAUSE BECAUSE IT RETROACTIVELY CHANGES THE PROVISIONS IN ALLIED'S CONTRACTS WHICH CONTROL THE VESTING AND FUNDING OF PENSIONS.

A. The Majority and the Dissenting Opinions in United States Trust, and the History of Contracts Clause Jurisprudence All Show That States Cannot Impair Private Contracts More Easily Than They Can Impair Public Contracts.

In *United States Trust Co.* v. *New Jersey*, 431 U. S. 1 (1977), the Court held that the Contracts Clause forbade New Jersey's altering its own contract. The Court stated that the Clause has an "important place in our constitutional jurisprudence" (*id.* at 15) and that "its limitation on state power was [not] illusory" (*id.* at 16). There is nothing in the opinions in *United States Trust* limiting their teachings to public, as distinguished from private, contracts.

However, the decision at bar limits *United States Trust* only to impairments of public contracts, holding that "policy judgments" of state legislators, converted into legislation to impair private contracts, are entitled to "considerable deference", even if the legislation throws uncontracted-for basic burdens on one party and emoluments on the other. J. A. A-69, A-70, A-75.

The theory that private contracts are less protected by the Constitution than public contracts, or, stated another way, that legislation impairing private contracts is to be reviewed with less scrutiny than that impairing public contracts has not heretofore been the law. The theory was arrived at only by placing

into one context language from *United States Trust* used in two divergent contexts.[1]

The first two sentences of the District Court's quotation (see footnote) are from a section of this Court's opinion discussing the general subject of a state's regulatory power (431 U. S. at 22). The third sentence of the quotation is taken from a section of this Court's opinion dealing with the constitutionality of a state's changing its own financial obligations (*id.* at 25-26). These sentences, separated by three pages in the Official Report, were juxtaposed or melded by the District Court without a hint that they dealt with different subjects. In the final quoted sentence, this Court, which had discussed the theory of inalienable sovereignty, was explaining why that theory did not apply to the security provision in *United States Trust*. This paragraph, in context, in the Opinion in *United States Trust*, distinguished

1. The District Court opined:

"In assessing the bondholders' Contract Clause challenge, the Supreme Court began by drawing an important distinction between general regulatory legislation impairing a range of private contracts and legislation abrogating a particular contract to which the state was a party. As to the former, the Court acknowledged that a more relaxed standard of review must apply; but when the state itself was a party, it conceded that complete deference to the legislature's judgment was inappropriate.

> The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. * * * As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.
>
> * * * *
>
> In applying this standard [to the instant case], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.

United States Trust Co. of New York v. *New Jersey, supra* at 52 L. Ed. 2d 109-110, 122." J. A. A-69, A-70.

between a state's financial contracts and a state's other contracts. Thus, the District Court, by placing this sentence next to those three pages earlier in this Court's opinion, changed the distinction to one between a state's contracts and private contracts. In so doing, the District Court invented a standard of review which reversed history and all legal teaching.

The Framers clearly intended the Contracts Clause to protect the stability of private contracts. Edmund Randolph, in the Virginia Convention which ratified the Constitution, argued that the Contracts Clause was essential because it prevented "interferences of the State Legislatures with private contracts." Warren, *The Making of the Constitution* at 555 (1928), quoting 3 Elliot's *Debates on the Adoption of the Constitution* 478-79. James Madison, writing as Publius in Federalist No. 44, maintained that the Contracts Clause proscribed "legislative interferences in cases affecting personal rights". *The Federalist* at 301 (Jacob E. Cooke, ed. 1961). Soon after the Constitution was adopted, courts held that the Contracts Clause prevented state legislatures from interfering with private contracts. See *Alexander Champion and Thomas Dickason* v. *Silas Casey* (C. C. D. R. I. 1792) and *Church Land Cause* (C. C. D. Vt. 1799), both described in 1 Warren, *The Supreme Court in United States History* at 66-69 (1926). *Cf. Holmes* v. *Lansing*, 3 Johns. 73 (N. Y. 1802) and *Grimball* v. *Ross*, T. U. P. Charlt. 175, 180-81 (Ga. Super. Ct. 1808) (upholding the Contracts Clause but finding the particular laws did not impair contracts).

The Contracts Clause was later held to cover contracts to which states were a party. *Fletcher* v. *Peck*, 6 Cranch (10 U. S.) 87 (1810). In that case, Chief Justice Marshall said:

> Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general and are applicable to contracts of every description. (6 Cranch at 137.)

Marshall then went on to hold that public contracts were protected. It is worthy of note that Justice Johnson, in partial dissent on other grounds, said:

> There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection of individual rights against the acts of state legislatures. (*Id.* at 144.)

Thus was formed the rule that a state could impair neither private nor public contracts.

History explains the development of a limitation on this rule insofar as public contracts are concerned. In response to *Fletcher*'s recognition that the Contracts Clause covered public contracts, courts developed the doctrine that nevertheless one legislature could not restrict the sovereignty of subsequent legislatures. In *United States Trust* both the opinion and the dissent recognized this doctrine.

The majority in *United States Trust*, citing cases in which states had contracted away various powers, stated that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty" (431 U. S. at 23-24 and notes 20, 21); the dissent, hypothesizing a case in which a legislature perpetuated its policy by making contracts instead of laws, agreed that "new legislators will not automatically be bound by the policies and undertakings of earlier days" (*id.* at 45). Thus, in *United States Trust*, the majority and the dissent agreed that, historically, states could not impair either public or private contracts but that their ability to impair some public contracts arose as a limitation on the rule.

However, in the opinion at bar, the District Court held that a state could impair private contracts more easily than it could impair public contracts. The District Court recognized that, because of the sovereignty conflict, states can impair public contracts more easily than private contracts but quixotically held that private contracts may be impaired more easily than public.

B. The Minnesota Act, by, in Effect, Retroactively Forcing All Pensions to Vest in Ten Years and Retroactively to Be Funded Therefor, Rather Than in Substantially Longer Periods, Drastically Impaired the Express Substantive Terms and Obligations of Allied's Contracts to An Extent That Could Not Have Been Anticipated.

The decision under review has created a vicious doctrine that citizens can anticipate legislatures, despite the Constitution, to revise and impair the express terms of important financial contracts.

This "anticipation" theory is based upon (a) ignoring the provisions of the Pension Plan that clearly anticipated its possible termination and (b) an egregious misreading by the District Court of Note 17 in the *United States Trust* opinion as we now demonstrate:

The District Court, in reaching its conclusion, ignored the plain terms of the Pension Contracts. First, they provided that pensions are payable only out of the Trust the Plan creates. *See* § 15(2) at 17a, Appendix, *infra*. Second, that the Plan may be terminated. *See* § 14 at 13a, Appendix, *infra*, Art. IX at 26a, Appendix, *infra*. Section 14 provides an unqualified right to terminate the Plan or to cease contributions thereto, but that, the rights of all employees to the date of termination or discontinuance, to the extent then funded, shall be non-forfeitable and fully vested. *See* 13a-14a, Appendix, *infra*.

Section 14 sets forth the order in which payments are to be made from the assets of the Trust: first, to provide benefits to persons already retired; second, benefits for those persons whose rights are fully vested and who are eligible for retirement; thirdly, "if any balance of the net assets of the Trust Fund remain after application * * * the Trustee shall apply such balance toward the benefit of all other employees covered by the Plan." *Id*. That, and only that, is what the parties had a right to anticipate upon partial termination of the Plan by closure of the Minnesota office.

To meet its contractual obligation, Allied made contributions to the Plan in accordance with the calculations of actuaries who, following generally accepted actuarial methods, determined that a number of eligible employees would not attain vestiture and, of those who did, a number would never collect a pension for many reasons such as termination of employment and death prior to retirement. The actuaries assumed that pensions would vest after 20 years. J. A. A-75, n. 5. Therefore, when the Plan was terminated as to Minnesota employees, it was not surprising or unanticipated that there were not sufficient assets to provide pension benefits for persons whose rights were not vested and who were not entitled to a pension. But Minnesota would have Allied retroactively pay funds it would have reserved if the terms and provisions of the Plan had provided for a 10-year vesting period.

Before the District Court, Minnesota conceded that its Act impaired the obligations of Allied's pension contracts J. A. A-71, but the District Court excused the impairment on the theory "that a factor to be considered in determining the *extent of impairment* is the *legitimate expectations* of the contracting parties" (emphasis supplied) J. A. A-70. The District Court agreed that Allied could not have expected the possibility of vesting at an earlier date than the contracts provided, *but* that its claim that payment to these employees was not anticipated was flawed because "the likelihood of payment" and the need to accumulate a reserve for that purpose was anticipated. J. A. A-73, A-74.

The District Court offered the foregoing "arguments" "to shed some light" on the concerns expressed by the Supreme Court in *United States Trust* for the "legitimate expectations" of the contracting parties and to show that the obligations created by the Minnesota Pension Act "are not so significantly beyond the parties initial expectations that the Act should be declared unconstitutional." J. A. A-74.

If we correctly read the last two paragraphs of Part II of the District Court's opinion, they say at one and the same time, that Allied could not be expected to anticipate the possibility of earlier vesting than the contract provided but that the payment of the pensions that would be created thereby and the necessity of an adequate reserve to meet them should have been anticipated and, therefore, *the impairment of the express provisions of the contract was to be anticipated*. We may do the District Court an injustice, but it is difficult for us to make anything else but that from the last two, and highly important, paragraphs of Part II of its opinion.

And to make the matter worse, the District Court bases its *tour de force* on asserted concern for Note 17 of the Court's opinion in *United States Trust* and, in so doing, wholly misreads it.

In *United States Trust*, the Court, in Note 17, after recognizing that the obligations of a contract also include contemporaneous State law pertaining to interpretation and enforcement thereof, also said that the parties "are unlikely to expect that State law will remain entirely static", suggested that "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations *than a law adjusting the express terms of the Agreement*". (Emphasis supplied, 431 U. S. at 20, n. 17.)

In short, despite the opaqueness of the District Court's opinion, it seeks to justify an impairment of the express, substantive terms of Allied's pension contracts on the theory this was in the "expectations" of the parties, whereas, this Court said that although citizens may expect some reasonable changes in remedies, they do not expect impairments of the express terms of their agreements. The conflict is apparent and inescapable. This Court was not talking about *extent* of impairment generally, it was talking about the *nature* of impairments that might be expected.

Minnesota, in fact, has impaired the contracts as much as if it now declared that Allied had to pay a minimum wage of $15.00 per hour retroactive to 1967.

Comparing this case to *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934), proves the severity of this impairment. In *Home Building & Loan*, the Court upheld an emergency statute which delayed foreclosures if the mortgagor would pay the mortgagee a reasonable rent. As the Court pointed out several times, the statute altered neither the integrity of the mortgage debt, the obligation to pay interest, the validity of the foreclosure sale, the right to a deficiency judgment, nor any condition of the redemption except its time of exercise. 290 U. S. at 425, 445. Both sides received their due: the mortgagee, agreed money; the mortgagor, agreed possession.

In the case at bar, Minnesota went far beyond *Home Building & Loan*. As the Court of Appeals for the Eighth Circuit said in another case challenging the Minnesota Act, "The Minnesota Pension Act directly intrudes upon the employer's substantive obligations under the pension plan, obligations arrived at freely through collective bargaining, and appears in its operation to be a unique legislative act." *White Motor Corporation* v. *Malone*, 545 F. 2d 599, 604 (1976), now before this Court as No. 76-1184. The pension plan at bar, although not collectively bargained as was the plan in *White Motors*, was a contract and was "directly intrude[d] upon."[2]

2. We realize that *White Motor* is before the Court as a pre-emption case under the supremacy clause. Nevertheless, we suggest that the granite underlying White's position is the immunity of its contract to state impairment. This is because the basic achievement of the National Labor Relations Act was to empower the agent selected by a majority of the employees in an appropriate bargaining unit to make a contract with the employer that was binding for and enforceable against the employer and all employees in the unit. (*See generally J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332 (1944).)

Such contracts were unknown when the Constitution was adopted.

But the Labor Act added a new element and elevated what had come to be known as trade union agreements for union members to the status of enforceable contracts binding on all in the unit and, as contracts, assuming otherwise lawful, immune to state impairment.

Individual contracts had always enjoyed the privilege against state impairment which now devolved on bargaining unit contracts.

(Footnote continued on next page.)

Unlike *Home Building & Loan*, Minnesota has not given each party its due; instead, it has written an entirely new contract, containing terms unanticipated by either party, forcing retroactive burdens on one and emoluments on the other.

C. The Minnesota Act Is Not Reasonable and Necessary to Serve An Important Public Goal.

The Contracts Clause limits a state's sovereignty. *Murray* v. *Charleston*, 96 U. S. 432, 444 (1877). Nevertheless, the District Court apparently assumed that the real questions were whether the legislature addressed an issue of public concern and whether it acted arbitrarily. J. A. A-78, A-79. Since all legislation, save private bills, addresses issues of public concern, under the District Court's analysis no statute would come under the stricture against impairing the obligations of contracts. This analysis would emasculate the Contracts Clause.

Comparing the case at bar with *United States Trust* shows the absence of an overriding public concern. In *United States Trust*, the challenged statute affecting the funding mechanism of a bond was adopted in the interest of conserving energy, protecting the environment, and transporting the public. 431 U. S. at 28-29. Nevertheless, the Court held the statute unconstitutional. Those underlying objectives touched virtually every citizen in a vast megapolis. Retroactively changing a pension plan for a relative handful of Minne[illegible] citizens does

(Footnote continued from preceding page.)

That the collective contract is the *desideratum* of federal labor policy is only an additional reason for the immunity of such contracts from state impairment. It would be anamolous if collectively bargained pension plans were immune, but individually created plans of the same nature were not; that the newly created labor contract was more sacrosanct than one individually made which the drafters of the Constitution intended to protect.

The contractual nature of a unilaterally offered pension plan must be grasped. It is akin to bond or debenture issues in which there is no bargaining with the buyers but nevertheless solid contracts are made. The pension plan is as solid a contract with employees as the securities are with the holders thereof.

not. Indeed most of the public, particularly in a predominantly agricultural state such as Minnesota, does not even enjoy private pensions.[3] At worst, late vesting creates an unsatisfactory pension plan; it does not endanger the public. Courts have implicitly recognized this distinction. New Jersey, for example, upheld the statute involved in *United States Trust*, but struck down one resembling the Minnesota Act. Compare *United States Trust Co.* v. *State*, 134 N. J. Super. 124, 338 A. 2d 833 (1975), *aff'd* 69 N. J. 253, 353 A. 2d 514 (1976), *rev'd* 431 U. S. 1 (1977), to *Raybestos-Manhattan, Inc.* v. *Glaser*, 144 N. J. Super. 152, 365 A. 2d 1 (1976). If the statute in *United States Trust*, was unconstitutional, then the Minnesota statute must be unconstitutional *a fortiori*.

3. Less than one-third of Minnesota's non-government workers had private pensions, as tabulated below, assuming that, in Minnesota, the percentage of employees with private pensions was the same as that in the United States. Of course, most of these pensions were unaffected by the Minnesota Act because not many plants with pension plans were closed. The column below, "Thousands of Employees" is taken from U. S. Dept. of Commerce, *1976 Statistical Abstract of the United States* at 367 and 633. The column "Percent of Employees with Private Pensions" is taken from *id.* at 307. The final colum is calculated.

Occupation	Thousands of Employees	Percent of Employees with Private Pensions	Thousands of Employees with Private Pensions
Farm	483	7%	34
Wholesale and Retail	370	35%	129
Manufacturing	313	61%	191
Services	279	24%	67
Transportation and Public Utilities	90	61%	55
Finance, Insurance and Real Estate	75	52%	39
Construction	62	34%	21
Mining	14	72%	10
Totals	1,685		546 or 32.4%

Even under the teaching of the dissent in *United States Trust* as to overriding public goals, the Minnesota Act must be struck down. As the dissent noted, the New Jersey statute under consideration in *United States Trust* impaired neither the principal nor the interest of the bonds affected, but only changed an underlying security. 431 U. S. at 41-44. In contrast, the Minnesota Act has totally rewritten a crucial part of the contract.

The District Court tried to find a crucial public interest by opining that Minnesota feared for its "senior citizens". J. A. A-76. But Minnesota could just as easily fear for its young citizens, its middle-aged citizens, its childless citizens, its parent citizens, *ad infinitum*. Minnesota demonstrated, to paraphrase from the Court, that a governmental entity can always find excuses for extra benefits especially when taxes do not have to be raised. (*See United States Trust*, 431 U. S. at 26.)

Further, the Minnesota Act is unreasonable, even assuming a public need, as seen by contrasting it to the Employee Retirement Income Security Act of 1974 ["ERISA"], P. L. 93-406, 88 *Stat.* 829. Even though Minnesota is commanded by the Constitution to respect existing contracts while Congress is not, Congress was far more respectful of contract rights than was Minnesota. For example, Representatives Ashbrook, Erlenborn, Eshleman, Hansen and Quie believed Congress lacked the constitutional power to "change the contract of an employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." Supplemental Views, H. R. Rep. No. 533, 93d Cong., 1st Sess. (1973). Congress acted prospectively in lowering vesting and entitlement requirements and did not force any employer to change his contracts. ERISA was signed by the President on September 2, 1974, to become effective in part on January 1, 1975, and in other parts at the start of the first pension plan year commencing after January 1, 1975. An employer dissatisfied with ERISA could keep any pension plan he wished, with the only penalty being the possible loss of a tax deduction.

Or he could simply terminate his plan. Many did so.[4] Minnesota did not even grant employers this element of fairness. Minnesota did not give objecting or financially pressed employers any way of avoiding the legislatively imposed terms; it rewrote the terms of the employment contracts by *force majeure*.

Assuredly the Minnesota Act does not meet the tests of *United States Trust* and can be upheld only if the Court decides that the Contracts Clause affords less protection to private contracts than it does to public ones. Such a conclusion would, we believe, reverse legal history and undo the Clause.

CONCLUSION.

The importance of contracts and the Contracts Clause to the citizens of a free, capitalistic society is difficult to overstate. Both the ordinary and the extraordinary affairs of life depend upon freely made lawful contracts that remain immune to state impairment.

The farmer works a lifetime to pay off his mortgage, then retires to town to live off his rent money or payments on the mortgage he has granted a buyer; filling stations and enormous factories and buildings are constructed only because someone is willing to advance money that will be paid back; parents save to create a college fund for their children which they are confident that they can draw on when the need arises. Examples could be cited endlessly and perhaps those we have mentioned

4. In a speech on the Senate floor, Senator Javits reported that an IRS survey indicated that perhaps 30% of the pension plans existent before ERISA was passed may close down. 134 Cong. Rec. S 13528 at S 13530 (daily ed. Aug. 4, 1977). From ERISA's enactment to November 5, 1977, over 19,000 pension plans filed to terminate. Telephone interview on November 17, 1977 with Joel Greenblatt, Pension Benefit Guaranty Corporation, 2020 K St., N.W., Washington, D. C. 20006 (202) 254-4817.

are not the best. But the importance of private contracts to everyone in our society is overriding.

If the District Court opinion at bar not be overruled, it will open the door for impetuous and, perhaps self-seeking, legislators to rip this, that, or the other contract apart in order to confer a favor upon, or ease the path of, some class or group.

It is respectfully prayed that the judgment of the District Court be reversed and the cause remanded to that Court with directions to enter a judgment substantially granting the prayer of the amended complaint and enjoining enforcement of the Minnesota Private Pension Benefit Protection Act.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
CHESTER W. NOSAL,
DAVID L. LEE,
Suite 5000,
One First National Plaza,
Chicago, Illinois 60603,

JOHN R. KENEFICK,
2200 First National Bank Building,
St. Paul, Minnesota 55101,
Counsel for Appellant.

Of Counsel:
WINSTON & STRAWN,
Suite 5000,
One First National Plaza,
Chicago, Illinois 60603.

February 28, 1978.

APPENDICES

APPENDIX.

PENSION PLAN FOR SALARIED EMPLOYEES OF ALLIED STRUCTURAL STEEL COMPANY, A DELAWARE CORPORATION, AND ALLIED STRUCTURAL STEEL CORPORATION, A TENNESSEE CORPORATION.

(As amended and effective at the time the Minnesota Act was adopted.)

Section 1. *Purpose:* The primary purpose of this Plan is to provide retirement benefits for eligible employees of Allied Structural Steel Company and Allied Structural Steel Corporation.

Section 2. *Definitions and Construction.*

1. Definitions: The following words and phrases when used in this Plan shall have the meaning set forth herein unless the context clearly indicates to the contrary:

(1) "Plan": The Allied Salaried Employees' Pension Plan, the Plan set forth herein, as amended from time to time.

(2) "Trust": The Allied Salaried Employees' Pension Trust, the Trust established to hold and invest the contributions of the employers for the exclusive benefit of employees included in the Plan.

(3) "Employers": Allied Structural Steel Company, a Delaware corporation, and Allied Structural Steel Corporation, a Tennessee corporation (a wholly owned subsidiary).

(4) "Retirement Committee": The persons appointed to administer the Plan.

(5) "Employee": A person who is receiving remuneration for full-time, personal services regularly rendered to the employers and who is not a member of a collective bargaining unit, including clerical employees, providing such person is one whose continued employment is for more than twenty (20) hours in any one week and more than five (5) months in any one year.

(6) "Part-time Employee": An employee who does not qualify under subparagraph (5) of paragraph 1 of this Section.

(7) "Retirement": The termination of employment after an employee has fulfilled all requirements for a pension. Retirement, generally, commences on the day immediately following the employee's last day of employment (or authorized leave of absence).

(8) "Normal Retirement": The first day of the month next following an employee's sixty-fifth (65th) birthday.

(9) "Continuous Service": Employment by an employer prior to retirement, calculated from the employee's last employment date in the case of re-employment, after a break in continuous service. A leave of absence which is authorized by the employers shall not be considered as interrupting continuity of employment. Leaves of absence may be granted for the purpose of service in the Armed Forces, sickness and disability. With respect to granting of leaves of absence, all employees under similar circumstances shall be treated alike.

(10) "Earnings": The basic compensation paid to an employee for personal services which are rendered during the period of continuous service, not including compensation in the form of bed and board or allowance therefor, overtime bonuses, commissions and other non-recurring compensation.

(11) "Average Monthly Earnings": The result obtained by dividing the sum of the monthly earnings earned by an

employee during the last sixty (60) full calendar months of continuous service prior to retirement by sixty (60) or by the number of months of employment, whichever is less.

(12) "Pension": A series of regular monthly amounts which are payable to a person who is entitled to receive benefits under the Plan.

(13) "Co-pensioner": The spouse of a retired employee who elects to receive a reduced pension pursuant to Section 7 of the Plan.

(14) "Total and Permanent Disability": Total physical or mental disability, or both, through some unavoidable cause so as to preclude engaging in any occupation or employment for remuneration which has continued for a period of six (6) months duration and which is reasonably expected to continue during the lifetime of the employee. A determination of total and permanent disability shall be predicated on medical evidence satisfactory to the Committee. No disability shall be deemed the consequence of any unavoidable cause which is (a) contracted, suffered or incurred as a result of engaging in a criminal enterprise; (b) the result of habitual drunkenness or narcotics addiction; or (c) the result of intentionally self-inflicted injury.

(15) "Effective Date": The date on which the Plan described herein goes into effect, which is April 1, 1963.

2. Construction: The masculine gender, where appearing in the Plan, shall be deemed to include the feminine gender, unless the context clearly indicates to the contrary. The words "hereof," "herein," "hereunder," and other similar compounds of the word "here" shall mean and refer to the entire Plan, not to any particular Section, unless the context clearly indicates to the contrary.

Section 3. *Eligibility of Employees for Pensions.*

1. After the effective date of this Plan, employees on retirement will be eligible for pensions as follows:

(1) An employee who retires on or after his normal retirement date will be entitled to a regular pension as provided in Section 5 of this Plan.

(2) An employee suffering from a total and permanent disability, as defined in Section 1 hereof, who on retirement has fifteen (15) years of continuous service, will be entitled to the following pensions:

(a) On retirement prior to his normal retirement date, the greater of:

(1) $100 per month, or

(2) A pension computed under Section 5 of this Plan but based on continuous service and average monthly earnings to date of retirement, whichever is greater.

(b) On attainment of his normal retirement date, a pension computed under sub-paragraph (a)(2) of this paragraph.

(3) An employee who retires prior to his normal retirement date shall be entitled to an early retirement pension under the following conditions:

(a) If he retires after attaining the age of sixty (60) years, at his option, after fifteen (15) years of continuous service; or

(b) If he retires after having attained the age of fifty-five (55) years or older, after twenty (20) years of continuous service, or such other lesser number of years of continuous service which, added to his age equals the sum of seventy-five (75) years; or

(c) If he retires prior to the time he attains the age of fifty-five (55) years, after twenty-five (25) or more years of continuous service, provided that the sum of his age and years of continuous service equals eighty (80) years.

(e) [*sic*] If any employee becomes eligible for an early retirement pension under any subparagraph of this Section and after a break in continuous service again enters the employ of an employer, his right to such pension is vested and if, after the termination of such second period of his employment, his continuous service thereunder does not qualify him for a pension under any of the provisions of this Section because of the length of his continuous service prior to the second break in continuous service, he shall remain eligible for the pension to which he would have been entitled had he not resumed employment, and his retirement shall be presumed to commence after the time of his first break in continuous service.

(4) An employee eligible to receive an early retirement pension as provided in subparagraph (3) of paragraph 1 of this Section will be entitled, on retirement, to receive either of the following pensions he elects:

(a) A regular pension commencing at the time he attains the age of sixty-five (65); or

(b) A reduced early retirement pension at the time of retirement based on the regular pension to which

he would have been entitled, reduced to its equivalent actuarial value at such time.

Section 4. *Deferred Retirement.*

The retirement of any employee may be extended at the option of the Retirement Committee of an employer from year to year from his normal retirement date until such time as the Retirement Committee considers retirement of such employee to be mandatory.

Section 5. *Pensions.*

1. *Basic Pension.* On retirement an employee will be entitled to receive a pension for the duration of his life, and upon his death his spouse will be entitled to receive a pension during her life of ½ this amount which is equal in value to the actuarial equivalent of the pension provided for in paragraph 2 of this Section.

2. If an employee so elects pursuant to subparagraph (4) of paragraph 4 of this Section, he will be entitled to receive a pension computed under either subparagraph (1) or subparagraph (2) of this paragraph, whichever yields the greater amount.

(1) A pension equal to the product of: (i) 1% of the average monthly earnings of the employee, and (ii) the number of years and fractions of years (computed to the nearest month) of continuous service; or

(2) A pension which is the sum of

(a) $2.60 multiplied by the number of years and fractions of years (calculated to the nearest month) of continuous service after March 31, 1963; and

(b) $2.50 multiplied by the number of years and fractions of years (calculated to the nearest month) of continuous service before April 1, 1963.

(3) The computation under subparagraph (2) of this paragraph shall be based on a maximum of thirty-five (35) years of continuous service.

3. For the first three months of retirement, in lieu of the pension provided for in paragraph [*sic*] 1 and 2 of this Section, employees described in subparagraph (1) of paragraph 1 of Section 3 hereof, and employees described in subparagraphs 3(a), (3)(b) and (3)(c) of paragraph 1 of Section 3 hereof, will be entitled to a "Special Pension" payable in a lump sum and equal in amount to three months' pay computed on the same basis as vacation pay, paid or payable in the year of retirement.

4.

(1) The pension of an employee described in subparagraph (3) of paragraph 1 of Section 3 entitled to an early retirement pension will be computed under paragraph 1 of this Section based on continuous service and average monthly earnings to date of actual retirement, but payable on the first day of the month after his sixty-fifth (65th) birthday, unless he elects to receive the reduced early retirement pension provided for in subparagraph (4)(b) of paragraph 1 of Section 3, in which event the first payment under his pension will commence on the first day of the month following his retirement. However, with respect to any employee entitled to a "Special Pension" in accordance with paragraph 3 of this Section, the first installment of his regular pension will be payable on the first day of the fourth month after the month in which he retires or attains the age of sixty-five (65).

(2) If an employee who qualifies for an early retirement pension under paragraph 3 of Section 3 of this Plan dies prior to the time he actually retires, it shall be presumed, for the purpose of providing surviving spouse benefits under paragraph 1 of this Section that such employee had, in fact, retired on the day before he dies, and that

he had, in fact, made no election of any other alternative pension under this Plan.

(3) With respect to an employee whose retirement is deferred pursuant to Section 4 of this Plan, if he dies prior to actual retirement, it shall be presumed that he, in fact, retired on his normal retirement date and failed to make any alternative election of pension under this Plan.

(4) The election of any option may be made under this Plan at any time prior to one (1) year before retirement or at any other time, provided some evidence of good health is made to the Retirement Committee. Such election may be revoked at any time or one option cancelled and another selected within the time limit prescribed herein. An employee may also, in like manner, change the name of his co-pensioner or revoke either election of options without the consent of his co-pensioner.

Section 6. *Special Provisions Relating to Survivor Pensions.*

1. Any employee entitled to a pension under Section 3 of this Plan may elect to receive his pension as a reduced net pension payable to himself for life, and at his death the same pension to his spouse for life.

2. If a co-pensioner dies after commencement of payment of a pension to an employee, but prior to the death of the employee then receiving a pension; such employee shall continue to receive such reduced net pension for life.

Section 7. *Optional Lump Sum Settlement.*

1. An employee entitled to a pension under subparagraph (1) of paragraph 1 of Section 3, and an employee entitled to a pension under subparagraph (3)(a) of paragraph 1 of Section 3, who makes the election provided for in subparagraph (4)(a) of paragraph 1 of Section 3, may elect to receive his pension in a single lump sum payment. This lump sum plus the

special pension provided for in paragraph 2 of Section 5 shall be in lieu of all other payments and shall be the actuarial equivalent of such pension otherwise payable.

2. This lump sum payment shall be payable on the first day of the month after such employee attains the age of sixty-five (65) or the first day of the month after the month in which he retires, whichever is later.

3. An election to receive the lump sum payment may be made at any time prior to one (1) year before retirement or at any time prior to retirement on presentation of evidence of good health. This election will be effective on written acknowledgement by the Retirement Committee. It may be revoked at any time by the employee prior to retirement.

4. No optional lump sum payment provided for in this Section shall be payable prior to the due date specified in paragraph 2 of this Section. Unless the employee making such election is living on the due date such lump sum becomes payable, no benefits shall be payable under this Section of this Plan to such employee, his heirs, legatees, executors, administrators or assigns.

Section 8. *Restriction Against Competition:* If any former employee of an employer whose salary during the last full year of employment was in excess of $12,000 per year, and who is receiving a pension hereunder, enters into any business activity in competition with or antagonistic or prejudicial to the business affairs of either employer hereunder, his pension rights under this Plan shall be forfeited unless within sixty (60) days after notice from the Committee, he discontinues such activity.

Section 9. *Restriction Against Alienation of Pensions:* Except with respect to any indebtedness owing to the employers, benefits payable under this Plan shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution, or levy of any kind, either voluntary or involuntary, prior to actually being

received by the person entitled to the benefit under the terms of the Plan, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right to benefits payable hereunder shall be void. The Trust shall not in any manner be liable for, or subject to, the debts, contracts, liabilities, engagements or torts of any person entitled to benefits hereunder.

Section 10. *Contributions.*

1. Contributions by employers: The employers shall make contributions in such amounts and at such times as an actuary shall determine, as shall be necessary to meet the benefits payable pursuant to the Plan. All contributions made by the employers to the Trust shall be irrevocable and shall be used to pay benefits under the Plan, or to pay expenses of the Plan or Trust, to the extent not paid by the employers. If any forfeiture of pensions payable under this Plan shall occur at any time, such forfeitures shall be used to reduce the future contributions of the employers, and in no event may they be applied to increase the benefits any employee would otherwise receive under this Plan.

2. Contributions by employees: Employees are not required and shall not be permitted to make any contributions under this Plan.

Section 11. *Administration.*

1. Appointment of Committee: The Plan shall be administered under the supervision and control of a Retirement Committee consisting of at least five, and not more than nine, persons who may be officers, directors or employees of the employers. Members of the Committee shall be appointed from time to time by the Board of Directors of the Company and shall serve during the pleasure of the Board. The Committee shall not receive compensation for its services. All usual and reasonable expenses of the Committee may be paid in whole or in part by

the employers, and any expenses not paid by the employers shall be paid by the trustee out of the principal or income of the Trust.

2. Committee Powers: The Committee shall have all such powers as may be necessary to discharge its duties hereunder, including, but not by way of limitation, the power to construe or interpret the Plan, to determine all questions of eligibility, and to compute the amount and determine the manner and time of payment of any benefits hereunder. The Committee may adopt such rules and actuarial tables and methods as it deems advisable. It may employ such agents, attorneys, accountants, actuaries, medical advisors, or clerical assistants (none of whom need be members of the Committee) as it deems necessary for the effective exercise of its duties, and may delegate to such agents any powers and duties, both ministerial and discretionary, as it may deem expedient and appropriate.

3. Committee Procedures: The Committee shall adopt such by-laws as it deems advisable. The Committee shall elect one of its members as chairman and another as secretary. All acts and determinations of the Committee shall be recorded by the secretary, or under his supervision, and all such records, together with such other documents as may be necessary for the administration of the Plan, shall be preserved in the custody of the secretary. The Committee may take any action upon a majority vote of its members at any time acting, and any statement or document signed by a majority of such members shall have the same effect and may be relied upon to the same extent as if signed by all the members.

4. Rules and Decisions: All rules and decisions of the Committee shall be uniformly and consistently applied to all employees in similar circumstances. Any rule or decision which is not inconsistent with the provisions and purposes of the Plan shall be conclusive and binding upon all persons affected by it.

5. Authorization of Benefit Payments: It shall be the duty of the Committee to furnish the trustee with all facts neces-

sary or pertinent to the proper administration of the Trust Funds, including the names of all persons who shall, from time to time, be entitled to benefits under the Plan, the amounts payable to each, and the dates of payment.

6. Books and Records: The records of the employers shall be conclusive evidence as to all matters forming the basis for participation in the Plan and for the calculation of the benefits.

7. Perpetuation of Committee: In the event that the Company shall cease to be in existence, then, unless the Plan is adopted by a successor, the members of the Committee at that time shall remain in office until final termination of the Trust, and any vacancies in the membership of the Committee caused by death, resignation, disability, or other cause, shall be filled by the remaining member or members of the Committee.

Section 12. *Appointment of Trustee.*

1. A trustee (or trustees) shall be appointed by the Company to administer the Trust. The trustee shall serve at the pleasure of the Company, and shall have such rights, powers and duties as the Company shall from time to time determine.

2. All contributions under this Plan shall be paid to the trustee and shall be held, invested and reinvested by the trustee. All property and funds of the trust, including income from investments and from all other sources, shall be retained for the exclusive benefit of employees, under the direction of the Committee, and shall be used to pay benefits to employees or their beneficiaries, or to pay expenses of administration of the Plan and Trust to the extent not paid by the employers.

3. If any forfeiture of pensions payable under this Plan shall occur at any time, such forfeitures shall be used to reduce the future contributions of the employers, and in no event may they be applied to increase the benefits any employee would otherwise receive under this Plan.

Section 13. *Amendments:* The Board of Directors of the Company reserves the right from time to time to modify, alter or amend this Plan, as well as the Trust provided for herein; provided, however, that no such action shall cause any part of the corpus or income of the Trust to be used for, or diverted to, any purpose other than for the exclusive benefit of employees included in the Plan or their beneficiaries. Any action which is to be taken or may be taken by the Board of Directors of the Company under the provisions of the Plan may be taken by the Executive Committee of the Company.

Section 14. *Termination.*

1. Right to Terminate: The Company may terminate the Plan at any time and may direct and require the trustee to liquidate the Trust. In the event of termination of the Plan or upon complete discontinuance of contributions under the Plan by the employer, the rights of all employees accrued to the date of such termination or discontinuance to the extent then funded shall be non-forfeitable and fully vested.

2. Distribution on Termination: In the event of termination of the Plan, the Committee shall direct the trustee to distribute the net assets of the Trust Fund in the following manner:

(1) The trustee shall apply, for the benefit of employees receiving pensions, as defined in Section 3 of the Plan, the equivalent actuarial value of each such employee's remaining pension payments. If the net assets of the Trust Fund are insufficient to provide the aggregate of such equivalent actuarial values then remaining, the pensions of each such employee shall be reduced pro rata in the proportion which such insufficiency bears to the full equivalent actuarial values.

(2) If any balance of the net assets of the Trust Fund remains after application for retired employees, as provided in subparagraph (1) of this paragraph, the trustee shall

apply such balance for the benefit of employees who are then eligible to retire, pursuant to Section 3 of the Plan. Such application shall be on the basis of the equivalent actuarial value of each such employee's pension, determined according to his continuous service to the date of termination of the Plan. If such balance is insufficient to meet such equivalent actuarial values in full, the retirement income for each employee in this second group shall be reduced pro rata in the proportion which such insufficiency bears to such full equivalent actuarial value.

(3) If any balance of the net assets of the Trust Fund remains after application pursuant to paragraphs 1 and 2 of this Section, the trustee shall apply such balance for the benefit of all other employees covered under the Plan. Such application shall be on the basis of the equivalent actuarial value of each such employee's pension, determined according to his continuous service to the date of termination of the Plan as if such date were his retirement date. If such balance is insufficient to meet such equivalent actuarial values in full, the retirement income for each employee in this second group shall be reduced pro rata in the proportion which such insufficiency bears to such equivalent actuarial value.

(4) Provided that no discrimination in value results, the Committee may direct that the amounts held for or payable to any or all pensioners or co-pensioners be paid in cash or in other assets, including insurance or annuity contracts, as the Committee, in its discretion, may determine. In no event shall the employers receive at any time any amounts from the Trust Fund, except such amounts as may remain after satisfaction of all liabilities under the Plan caused by variations in actual from expected actuarial requirements.

3. Restriction of Benefits Payable to Highly Compensated Employees in the Event of Early Termination of the Plan:

(1) To the extent that Section [*sic*] 5 and 8 of this Plan are in conflict with the provisions hereof, such Sections are hereby modified and controlled by the provisions of this sub-section.

(2) During the first ten (10) years after the establishment of this Plan or for the first ten (10) years after any substantial amendment, and in the event the full current costs of the Plan are not met at the end of such ten year periods until such time as the full current costs of the Plan are first met, the benefits provided by the employer's contributions for the employees, listed in Schedule X, will be subject to the conditions set forth in sub-divisions (4) and (5) hereof.

(3) For the purposes of these conditions:

(a) Schedule X shall consist of a list of the twenty-five (25) highest paid employees as of the time of establishment of the Plan, including any such high paid employees who are not participants at that time but may later become participants, but excluding any employees whose annual benefits provided by employer's contributions will not exceed fifteen hundred dollars ($1500).

(b) "Unrestricted benefits at any time" means benefits of the form called for by the Plan, including any withdrawal values available to a living employee and any death or survivor's benefits payable on behalf of an employee who dies after retirement, which have been provided by employer's contributions, not exceeding the larger of the following amounts:

(1) Twenty thousand dollars ($20,000), or

(2) An amount equal to twenty per cent (20%) of the first fifty thousand dollars ($50,000) of the employee's average regular

annual compensation, multiplied by the number of years since establishment of the Plan.

(c) "Supplemental retirement income payments" means any current payments to a retired employee sufficient, together with his unrestricted benefits, to bring the total current payments to him up to the full retirement income benefits provided under the Plan.

(4) If the Plan is terminated or the full current costs have not been met at any time within ten (10) years after its establishment, the funds or benefits which any of the employees listed in Schedule X may receive from the employer's contributions (including any unrestricted benefits but exclusive of any supplemental retirement income payments he has already received up to that time) shall not exceed his unrestricted benefits at that time.

(5) If any employee listed in Schedule X leaves the employ of the Company or withdraws from participation in the Plan when the full current costs have been met, the funds or benefits which he may receive from the employer's contributions (including any fund or benefit he has already received) shall not, at any time within the first ten (10) years after the establishment of the Plan, exceed his unrestricted benefits at that time.

(6) These conditions shall not restrict the full payment of any insurance, death, or survivor's benefits on behalf of an employee who dies while the Plan is in full effect and its full current costs have been met.

(7) The foregoing conditions do not restrict the current payment of full monthly retirement income benefits called for by the Plan for any retired employee while the Plan is in full effect and its full current costs have been met.

Section 15. *General Provisions.*

1. Employees' Rights Not Enlarged: Nothing contained in this Plan shall be construed as a contract of employment between an employer and any employee, or as a right of any employee to be continued in the employment of the employers, or as a limitation of the right of the employers to discharge any employee with or without cause.

2. Rights to Trust Assets: No employee shall have any right to, or interest in, any part of the Trust's assets upon termination of his employment or otherwise, except as provided from time to time under this Plan, and then only to the extent of the benefits payable to such employee out of the assets of the Trust. All payments of benefits as provided for in this Plan shall be made solely out of the assets of the Trust and neither the employer, the trustee, nor any member of the Committee shall be liable therefor in any manner.

3. Responsibility of Employers: Except to furnish the Committee statements and certificates of facts appearing on their records or material relevant to the proper administration of the Plan, the employers shall have no responsibility or liability whatsoever with reference to the administration of the Plan or to the management and conduct of the Trust or with reference to any act or failure to act upon the part of the Committee or the trustee or their agents, employees or attorneys.

4. Indemnification of Retirement Committee: Neither the Committee nor any member thereof shall be in any way liable for any act or failure to act in connection with the administration of the Plan, and the Company shall indemnify the Committee and each of its members and hold them harmless from the effects and consequences of their acts or conduct in their official capacity, except to the extent that such consequences are the result of their own wilful misconduct or breach of good faith.

Dated: August 7, 1963. [Signatures omitted in printing.]

ALLIED SALARIED EMPLOYEES' PENSION TRUST

This Trust Agreement, made this 7th day of August, 1963, by and between Allied Structural Steel Company, a Delaware corporation, and Allied Structural Steel Corporation, a Tennessee corporation (referred to as the "Companies") in a Pension Plan dated August 7, 1963, and The Northern Trust Company, an Illinois corporation, of Chicago, Illinois, with trust powers (hereinafter called the "Trustee"),

Witnesseth:

WHEREAS, the Companies have established the "Allied Salaried Employees Pension Plan" (hereinafter referred to as the "Plan"); and

WHEREAS, the Plan provides for a Trustee to receive and hold contributions paid under the terms of the Plan; and

WHEREAS, the Plan is to be administered by a Joint Committee (hereinafter referred to as the "Committee") appointed by the Companies (as provided in the Plan); and

WHEREAS, the initial members of the Committee have been appointed;

NOW, THEREFORE, to carry the Plan into effect, the parties hereto do hereby mutually declare and agree:

Article I: *Establishment of Trust*

1. The Companies hereby create and establish a Trust to be known as the "Allied Salaried Employees Pension Trust" in order to carry out the purposes of the Plan.

2. The Trust Fund shall consist of contributions received by the Trustee and the earnings and increment thereon, less disbursements therefrom.

Article II: *Contributions to Trust Fund*

Contributions are to be paid to the Trustee by the Companies. The Trustee shall be accountable for all contributions received from the Companies, but shall have no duty to determine that the amounts received comply with the provisions of the Plan or that the assets of the Trust are adequate to provide the benefits stipulated under the Plan.

Article III: *Payments from Trust Fund*

1. Payments shall be made from the Trust Fund by the Trustee to such persons, in such manner, at such times and in such amounts as the Committee shall from time to time direct the Trustee. All directions by the Committee to the Trustee shall be in writing, signed by one Committee member but no member of the Committee shall sign any directions for any distribution to be made to himself. The Trustee shall be fully protected in making payments out of the Trust Fund in accordance with such written directions and shall have no responsibility to see to the application of such payments or to ascertain whether such directions comply with the terms of the Plan, and shall not be liable for any payment made by it in good faith without actual notice or knowledge of the changed condition or status of any person receiving payments hereunder.

2. If any payments directed to be made from the Trust Fund are not claimed, the Trustee shall notify the Committee, and shall dispose of such payments as the Committee shall direct. In case any payment becomes payable to a person under legal disability or to a person not adjudicated incompetent but who by reason of illness or mental or physical disability is in the opinion of the Committee unable properly to administer such amounts, the payment may be made by the Trustee in accordance with the applicable provisions of the Plan, as directed by the Committee.

3. The Trustee shall be reimbursed for all of its costs and expenses, and shall be paid such reasonable compensation as may be agreed upon from time to time by the Committee and the Trustee. Such costs, expenses, and compensation shall be paid from the Trust Fund. The Trustee shall also pay out of the Trust Fund the expenses of administration of the Plan, including actuarial, accounting, and legal expenses, to the extent that the Committee shall so direct.

Article IV: *Investment of Trust Fund.*

The Trust Fund, except such estimated amounts as are required for current payments and expenses, shall be invested and reinvested without distinction between principal and income. The Trustee is authorized to invest in such bonds, notes, debentures, mortgages, equipment trust certificates, preferred or common stocks, or in such other property, real or personal, either within or without the State of Illinois, as may be permitted, from time to time, in accordance with the applicable statutes of the State of Illinois, pertaining to investments by Trustees. The Trustee is further authorized to invest in common or preferred stocks, bonds, mortgages or notes secured by deed of trust, debentures or other securities of the companies as the committee may direct. The Trustee is authorized subject to the committee's prior direction and consent to lease, sell, exchange, transfer or dispose of, retain and grant options with respect to any such investment directed by the committee. The Trustee is further authorized subject to the discretion and prior consent of the committee:

(a) To make such warranties, representations and indemnifications in connection with the sale or other disposition of such investments as the committee considers appropriate;

(b) To compromise, compound and settle any debt or obligation due to or from the Trust, to reduce the rate of interest on, to extend or otherwise modify, or to foreclose upon default or otherwise modify, or to foreclose upon default or otherwise enforce any such obligation;

(c) To vote in person or by proxy on any stocks, bonds or other securities; or exercise any options appurtenant to any such stocks, bonds or other securities for the conversion thereof into other stocks, bonds or other securities and to make payment therefor;

(d) To join in or to dissent from, and to oppose the reorganization, recapitalization, consolidation, sale or merger of corporations or properties upon such terms and conditions as are considered expedient.

The Trustee may hold any portion of the Trust Fund in cash pending investment or payment of costs of expenses or benefits without liability for interest. Anything contained herein to the contrary notwithstanding, the Trustee is authorized to deposit any part or all of the funds held under this Trust Agreement with The Northern Trust Company, an Illinois corporation, of Chicago, Illinois, as Trustee, under that certain "Declaration of Trust creating the Collective Employee Benefit Trust Fund of The Northern Trust Company" dated October 2, 1961, as the same may be amended from time to time, such funds to be held and invested by The Northern Trust Company as such Trustee, pursuant to all the terms and conditions of such Declaration of Trust, which is hereby incorporated by reference herein.

Article V: *Powers of Trustee.*

The Trustee is authorized and empowered: to hold, manage, improve, repair and control all property, real or personal, at any time forming part of the Trust Fund; to sell, convey, transfer, exchange, partition, lease for any term, even extending beyond the duration of the Trust, and otherwise dispose of the same

from time to time in such manner, for such consideration and upon such terms and conditions as the Trustee, in its discretion, shall determine; to employ such agents and counsel as may be reasonably necessary in managing and protecting the Trust Fund and to pay them reasonable compensation; to settle, compromise or abandon all claims and demands in favor of or against the Trust Fund; to vote any corporate stock either in person or by proxy for any purpose; to exercise any conversion privilege or subscription right given to the Trustee as the owner of any security forming a part of the Trust Fund; to consent to, take any action in connection with, and receive and retain any securities resulting from any reorganization, consolidation, merger, readjustment of the financial structure or sale of the assets of any corporation or other organization, the securities of which may constitute a portion of the Trust Fund; to cause any securities or other property which may at any time form a part of the Trust Fund to be issued, held or registered in the name of its nominee, or in such form that title will pass by delivery, provided the records of the Trustee shall indicate the ownership of such securities; to borrow from anyone, including the Trustee, such sum or sums, at any time and from time to time, as the Trustee may consider necessary and desirable and for the best interests of the Trust Fund and for that purpose to mortgage or pledge all or any part of the Trust Fund; to pay any estate, inheritance, income, or other tax, charge, or assessment which it shall or may be required to pay out of any moneys or other property in the Trust Fund for the account of the person whose interests hereunder may be liable for such tax; and, in addition to the enumerated powers herein, to do all other acts in its judgment necessary or desirable for the proper administration of the Trust Fund.

Article VI: *Accounts of Trustee.*

1. The Trustee shall maintain accurate and detailed records and accounts of all investments, receipts, disbursements and other transactions hereunder, and all accounts, books, and records relating thereto shall be open at all reasonable times to inspection and audit by any person or persons designated by the Committee.

2. Within sixty (60) days following the close of each annual period (as may be agreed upon by the Trustee and the Committee), the Trustee shall file with the Committee a written account setting forth a description of all securities and other property purchased and sold, all receipts, disbursements, and other transactions effected by it during such annual period, and listing the securities and other property held by it at the end of such period.

3. The Committee may approve such accounting by written notice of approval delivered to the Trustee or by failure to express objection to such accounting in writing delivered to the Trustee within six (6) months from the date upon which the accounting was delivered to the Committee.

4. Upon receipt of a written approval of the accounting, or upon the passage of said period of time within which objections may be filed, without written objections having been delivered to the Trustee, such accounting shall be deemed to be approved, and the Trustee shall be released and discharged as to all items, matters and things set forth in such accounting as if such accounting had been settled and allowed by a decree of a court of competent jurisdiction in an action or proceeding in which the Trustee, the Committee and all persons having or claiming to have any interest in the Trust Fund or under the Plan, were parties. The Trustee, nevertheless, shall have the right to have its accounts settled by judicial proceeding if it so elects, in which event only the Trustee and the Committee shall be necessary parties.

Article VII: *Responsibility of Trustee.*

1. The Trustee shall be fully protected from any responsibility for any action taken or omitted in accordance with written directions purporting to be signed by the persons authorized to sign for the Committee. The Trustee may rely upon any certificate, notice or direction purporting to have been signed on behalf of the Committee which the Trustee believes to be genuine and to have been signed by the members of the Committee or by an agent of the Committee whose authority has been certified to it by the Committee. Until and unless the members of the Committee shall file with the Trustee a certificate of the appointment of a new member, the Trustee may rely upon any certificate, notice or direction purporting to have been signed by the members of whose appointments the Trustee shall have last been duly notified.

2. The Trustee may consult with counsel, who may be counsel for the Employers in respect of any of its duties or obligations hereunder and shall be fully protected in acting or refraining from acting in accordance with the advice of such counsel.

Article VIII: *Succession of Trustees.*

1. The Trustee and any successors in trust may be removed by the Companies at any time upon the giving of sixty (60) days' notice in writing to the Trustee then acting, but such notice may be waived by the Trustee. Such removal shall be effected by delivering to the Trustee a written notice of its removal, and by giving notice to the Trustee of the appointment of a successor Trustee in the manner hereinafter set forth.

2. The Trustee and any successors in trust may resign as Trustee hereunder by filing with the Companies a written resignation which shall take effect sixty (60) days after the date thereof, unless prior thereto a successor Trustee shall have been appointed.

3. The Companies may appoint a successor Trustee by delivery to the removed or resigning Trustee of (a) an instrument in writing, appointing such successor Trustee, and (b) an acceptance in writing executed by the successor Trustee so appointed, and the appointment shall take effect upon such delivery.

4. Any successor Trustee may be a bank or trust company incorporated under the laws of the United States of America or any State thereof. All of the provisions set forth herein with respect to the Trustee shall relate to each successor Trustee so appointed, with the same force and effect as if such successor Trustee originally had been named herein as Trustee.

5. Upon the appointment of a successor Trustee, the removed or resigning Trustee shall transfer and deliver the assets in the Trust Fund to such successor Trustee, after reserving such reasonable amount as it shall deem necessary to provide for any sums chargeable against the Trust Fund for which it may be liable. The receipt of the successor Trustee and the approval of the Committee to the final accounting of the removed or resigning Trustee shall be a full and complete acquittal and discharge of such removed or resigning Trustee; and any successor Trustee shall have no liability whatsoever for the acts or omissions of any prior Trustee. If the Committee shall fail to express objection to such accounting in writing delivered to the removed or resigning Trustee within six (6) months from the date of receipt by the Committee of such final accounting, such accounting shall be considered as approved.

6. In the event that any corporate Trustee hereunder shall at any time merge or consolidate with, or shall sell or transfer substantially all of its assets and business to another corporation, state or federal, the corporation resulting from such merger or consolidation or the corporation into which it is converted or to which such sale or transfer shall be made shall thereupon become and be the Trustee under this Agreement with the same effect as though originally so named.

Article IX: *Termination of Trust.*

1. This Agreement and Trust may be terminated at any time by the Companies upon written notice delivered to the Trustee. Upon such termination the Trust Fund may be continued or liquidated, in accordance with the written directions of the Committee and the applicable provisions of the Plan. Unless sooner terminated, the Trust created hereunder shall terminate when there shall be no funds remaining in the hands of the Trustee hereunder.

2. In no event shall the Companies at any time receive any amounts from the Trust, except such amounts as may remain after the satisfaction of all liabilities of the Plan and arising out of the variations as between actual requirements and expected actuarial requirements.

3. If the Trust is terminated for any reason, the Trustee may reserve from the Trust Fund such reasonable amount as it shall deem necessary to provide for any sums chargeable against the Trust Fund for which it may be liable.

4. From and after the date of the termination of the Trust and until the final distribution of the Fund, the Trustee shall continue to have all the powers provided under the Trust Agreement as are necessary and expedient for the orderly liquidation and distribution of the Fund.

Article X: *Amendments to Trust.*

The Companies shall have the right at any time and from time to time to amend this Agreement in whole or in part by an instrument in writing executed by them and delivered to the Trustee provided that no amendment shall cause any part of the Trust Fund to be used for, or diverted to, purposes other than for the exclusive benefit of employees covered under the provisions of the Plan, and provided further, that the rights, duties or responsibilities of the Trustee shall not be changed

in any manner without its written consent. Any amendment shall become effective upon the date therein stated but shall not be binding upon the Trustee until delivery of the written amendment to the Trustee, provided that any amendment which changes the rights, duties or responsibilities of the Trustee shall become effective only upon the endorsement of the Trustee's written consent.

Article XI: *Jurisdiction.*

1. This Agreement shall be construed and enforced according to the laws of the State of Illinois.

2. In case any provisions of this Trust Agreement shall be held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining provisions of this Trust Agreement, but shall be fully severable, and the Trust Agreement shall be construed and enforced as if said illegal or invalid provisions had never been inserted herein.

Article XII: *Guarantees.*

1. The Committee shall have complete authority to determine the existence, nonexistence, nature and amount of the rights and interests of all persons in the Trust Fund or under the Plan. In any action or proceeding affecting the Trust Fund or any property constituting part or all thereof, or the administration thereof, or for instructions to the Trustee, the Committee, the Companies, and the Trustee shall be the only necessary parties, and no employees or former employees under the Plan or their beneficiaries, or any other person having or claiming to have an interest in the Fund or under the Plan shall be entitled to any notice or process, and any judgment that may be entered in such action or proceeding shall be binding and conclusive on all persons having or claiming to have any interest in the Fund or under the Plan.

2. No interest in any payments under this Trust shall be subject in any manner to attachment, anticipation, alienation,

sale, transfer, assignment, pledge, encumbrance, or charge; and any attempt so to attach, anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge shall be void. Nor shall the Trust be in any manner liable for or subject to the debts, contracts, liabilities, engagements, or torts of any person entitled to any pension.

IN WITNESS WHEREOF, the Companies, and the Trustee, respectively, have caused these presents to be signed by their duly authorized officers and have caused their respective corporate seals to be hereunto affixed, the day and year first above written.

[Signatures and corporate seals omitted in printing.]

brief for appellee